

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
DAVID M. GLOVER, JUDGE

DIVISION III

CA06-605

March 7, 2007

DANNY HEYDENREICH
APPELLANT

AN APPEAL FROM SEBASTIAN COUNTY
CIRCUIT COURT
[No. DR-2005-567(II)]

v.

SABRINA HEYDENREICH
APPELLEE

HONORABLE HARRY A. FOLTZ,
CIRCUIT JUDGE

AFFIRMED IN PART;
REMANDED IN PART

This appeal involves the financial aspects of a twenty-six-year marriage. Appellant Danny Heydenreich raises four points challenging the trial court's decisions awarding appellee Sabrina Heydenreich alimony of \$150 per week, dividing the parties' real and personal property, and ordering Danny to pay \$6,000 toward Sabrina's attorney's fees. We affirm in part and remand in part.

Danny and Sabrina were married in 1979. Danny was forty-eight at the time of trial and Sabrina was forty-four. Their two children were grown by the time this litigation began. The parties separated, and Danny filed his complaint for divorce on June 16, 2005. The complaint sought a divorce and an equitable division of the parties' real and personal

property. Sabrina filed an answer and a counterclaim in which she sought a divorce, a division of the parties' property, and temporary relief, including temporary alimony.

The main issue of the litigation was the division of the parties' property. Prior to trial, the trial court issued a pre-trial order in which it directed the parties to list all property, real and personal, marital and separate, with the value, debt owed, and proposed distribution of each item. Sabrina filed such an inventory, and that inventory was used extensively at trial.

The parties' marital residence had a fair market value of \$160,000 and was subject to a mortgage debt of \$140,151.67, resulting in net equity of \$19,848.33. The parties had also built another residence in Logan County on twenty acres that Sabrina acquired by gift prior to the marriage. The land had a fair market value of \$10,000 at the time of its acquisition and a fair market value of \$20,000 at the time of trial. The residence and improvements to the real estate had a fair market value of \$60,000 at the time of trial, and there was no debt against the property. The parties had contracted to sell the property for \$79,900, and there was a remaining balance of \$61,000 owed at the time of trial. However, the buyers were three months in default in making the payments.

Danny had an IRA account with a balance of \$67,733.67 and a 401(k) account through his employer with a balance of \$26,205.67, for a total of \$93,939.34. Sabrina had a 403(b) account with a balance of \$4,644.38, subject to a loan balance of \$2,320.07, for a net balance of \$2,324.31. She also had an IRA account with a balance of \$9,442.52 and a 401(k) account with a balance of \$8,045.92. Her account balances total \$19,812.75. The

parties also had a joint bank account and several separate accounts. The total of all account balances was \$114,237.23.

Danny testified that he was a truck driver for FedEx Freight, making \$21.05 per hour. He stated that his income in 2004 was approximately \$60,000 but that it would be somewhat less for 2005. He estimated his 2005 income to be between \$50,000 and \$53,000. Danny testified that Sabrina was a registered nurse, having obtained her nursing degree during the marriage. According to Danny, Sabrina had worked for Beverly Enterprises for about one year and was making \$42,000 per year. He stated that Sabrina had worked almost the entire time that they were married, except that she was off for a period following the birth of one of the children and for approximately one year with migraine headaches.

Danny testified that he wanted the parties' marital residence because it had a small shop that he had built. He said that he was willing to give the Logan County property to Sabrina, together with the income from the contract of sale on that house. At the trial court's suggestion, Danny discussed Sabrina's personal property inventory and stated whether he wanted each item or not. He disagreed with the valuations Sabrina had placed on certain items and suggested alternative evaluations. Among the items Danny specifically requested were a 2003 anniversary edition Harley Davidson motorcycle that he valued at \$14,000 dollars. He also requested a 1996 Ford F-150 Eddie Bauer edition pick-up truck that he valued at \$4,500. He also requested that he be allowed to keep all of his tools. Danny indicated that he did not want any of the household furnishings or Sabrina's vehicles; however, he did want a 1995 Harley Davidson motorcycle he believed to be worth \$8,500.

Sabrina testified that she was asking the court to award her the marital residence and its equity of \$19,848.33, subject to the mortgage. She explained that she was unable to move because she has too much debt and could not obtain a loan and that she is unable to clean the house to prepare it for sale. She also added that the marital residence was her “dream home” and the place she wanted her grandchildren “to come home to.” She said that she had taken steps to “foreclose” on the Logan County property. She wanted to be awarded the value of the Logan County property land and half of the improvements. She also stated that she wanted to keep her vehicle, a 2002 Toyota.

Sabrina testified she was employed at Beverly Enterprises doing case management, which allowed her to work while seated. In order to obtain another type of nursing job, she said that she would need to obtain a Bachelor of Science in Nursing degree, adding that she had applied to and been accepted at Oklahoma Wesleyan University. She testified that she could keep her job with Beverly while attending Oklahoma Wesleyan. She said that she could not attend the University of Arkansas at Fort Smith because she could not do the clinical work required there due to the fact that she would be on her feet all of the time. She estimated that it would take approximately three years to complete her degree because, although the program is normally eighteen months, she would first have to take five prerequisite courses. She estimated the cost at \$20,000.

According to Sabrina, she could not go back to being a staff nurse because her medical conditions prevented her from being on her feet. She described her medical problems as including two protruded disks in her neck, arthritis in her neck, pain extending

into her shoulder, and migraine headaches. She stated that she has to stay seated or the headaches become worse. She also stated that her condition prevented her from working during the day because exposure to light made her headaches worse.

Sabrina testified that her net income was approximately \$1,200 every two weeks, without any insurance or benefits. She was covered on insurance through Danny's policy because she could not obtain a policy with her pre-existing conditions. Sabrina said that she pays approximately \$255 dollars per month for her prescription medications. She asked the court for alimony of \$300 a week for three years until she completes school and then \$200 a week thereafter to help maintain her lifestyle. She also asked for her attorney's fees, stating that her attorney's fees prior to trial were slightly over \$7,000.

Other witnesses testified as to the difference between a Bachelor of Science in Nursing degree at Oklahoma Wesleyan University and at the University of Arkansas at Fort Smith and to the fact that Sabrina could not return to work as a staff nurse.

The trial court made its ruling from the bench and is commended for an efficient and equitable handling of substantial property issues. It awarded a divorce to Sabrina on her counterclaim. The trial court ordered the Logan County property sold, with Sabrina to receive one-quarter of the proceeds to compensate her for her pre-marital interest in the property, with the remaining three-quarters of the proceeds to be divided equally. All bank and retirement accounts were to be divided equally, and all marital debts not secured by specific property were to be divided equally. Certain personal property was awarded to Danny as his separate property, including the 2003 anniversary edition Harley Davidson motorcycle,

subject to any debt. Danny was also awarded other personal property that Sabrina had requested to be sold and the proceeds equally divided. Other items were ordered sold. Sabrina was awarded the marital residence, subject to the indebtedness. She was also awarded her 2002 Toyota, a 1985 Harley Davidson motorcycle, the household furniture and appliances, lawn equipment, and miscellaneous other items, most of which the trial court found that Danny did not object to Sabrina having. Sabrina was also awarded a judgment for \$2,380 as her half of the funds Danny withdrew from a joint bank account at the time of separation. Danny was ordered to pay alimony of \$150 per week, based on the trial court's consideration of Sabrina's age, her poor health, her lack of employment opportunities, the length of the marriage, and the parties' unequal income. Danny was ordered to pay \$6,000 towards Sabrina's attorney's fees within ninety days. A decree was entered on November 21, 2005, setting forth the trial court's orders.

After the decree was entered, Danny timely filed a motion for reconsideration or new trial in which he argued that the trial court should vacate its award of alimony to Sabrina or, in the alternative, provide that the alimony shall terminate upon the occurrence of one of the events listed in Ark. Code Ann. § 9-12-312 (a)(1) (Repl. 2002). Danny also argued that the trial court should reconsider what Danny considered to be an unequal division of property because Sabrina was awarded the marital residence, subject to the debt, with over \$19,000 in equity. Danny further asserted that the trial court failed to dispose of forty-eight items of personal property. Citing this court's decision in *Lofton v. Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988), Danny also sought reconsideration of the trial court's award of one-

fourth of the proceeds of the sale of the Logan County property to Sabrina, asserting that the entire property was marital property to be divided equally. Finally, Danny sought relief from the award of attorney's fees, asserting that he was unable to pay the fees.

The trial court denied the motion. However, the trial court made the alimony award subject to termination upon the occurrence of any of the conditions set out in Ark. Code. Ann. § 9-12-312. An amended decree containing this limitation was entered on December 9, 2005. Danny timely filed his notice of appeal from both the decree and the amended decree.

Alimony

In Danny's first point, he challenges the trial court's decision to award Sabrina alimony of \$150 per week. The decision whether to award alimony is a matter that lies within the trial judge's sound discretion, and on appeal, this court will not reverse an award of alimony absent an abuse of that discretion. *Cole v. Cole*, 89 Ark. App. 134, 201 S.W.3d 21 (2005) (*Cole II*). The primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* A court may also consider other factors including: (1) the parties' financial circumstances; (2) the amount and nature of the parties' income, both current and anticipated; (3) the extent and nature of the parties' resources and assets; (4) the parties' earning ability and capacity. *Id.*

Danny's argument is basically that Sabrina, age forty-four at the time of trial, has a professional nursing license and was working and therefore did not need alimony. He also relies on the fact that Sabrina worked for most of the parties' marriage. The trial court

considered the proper factors when it considered the parties' ages; Sabrina's poor health, her lack of employment opportunities without further education, and unequal income; as well as other factors in deciding to award Sabrina alimony of \$150 per week. Danny also argues that Sabrina does not need alimony because she received over \$76,000 in marital property. However, a spouse should not be required to deplete her share of the marital assets in order to become self-sufficient. *See Mearns v. Mearns*, 58 Ark. App. 42, 946 S.W.2d 188 (1997). We cannot say that the trial court abused its discretion in its award of alimony.

Real and Personal Property Division

We will discuss Danny's second and third points together because they both concern the trial court's division of property. In his second point, Danny argues that the division of the real estate was unequal where Sabrina was awarded the marital residence and ordered to assume the debt on that residence and where Sabrina was awarded one-quarter of the proceeds of the sale of the Logan County property to compensate her for her premarital interest therein. Danny's third point alleges that the trial court erred in its disposition of the personal property by not ruling on forty-eight specific items that Danny contends should have been sold and the proceeds divided equally.

With respect to the division of property in a divorce case, we review the trial judge's findings of fact and affirm them unless they are clearly erroneous. *Cole II, supra*. A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.* In order to demonstrate that the

trial court's ruling was erroneous, an appellant must show that the trial court abused its discretion by making a decision that was arbitrary or groundless. *Id.*

The first part of Danny's argument is that the trial court made an unequal division of the real property by awarding Sabrina one-fourth of the proceeds of the sale of the Logan County property to compensate her for her premarital interest and by awarding Sabrina the marital residence and not dividing the approximately \$19,000 in equity.

Arkansas Code Annotated section 9-12-315(a)(1) (Repl. 2002) provides that all marital property shall be distributed one-half to each party unless the court finds such a division to be inequitable; in that event, the court shall make some other division that the court deems equitable, taking into consideration certain factors. The statute further states that, when property is divided pursuant to these considerations, the court must state in the order its reasons for not dividing the marital property equally. Section 9-12-315 does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. *Copeland v. Copeland*, 84 Ark. App. 303, 307-08, 139 S.W.3d 145, 148-49 (2003); *Creson v. Creson*, 53 Ark. App. 41, 917 S.W.2d 553 (1996). The statute vests the trial judge with a measure of flexibility and broad power in apportioning property, non-marital as well as marital, in order to achieve an equitable distribution; the critical inquiry is how the total assets are divided. *See Page v. Anderson*, 85 Ark. App. 538, 157 S.W.3d 575 (2004). In addition, the specific enumeration of these factors does not preclude a trial court from considering other relevant factors, where exclusion of other factors would lead to absurd results or deny the intent of the legislature to allow the court to

make an equitable division of property. *Id.* We will not substitute our judgment on appeal as to the exact interest each party should have but will only decide whether the order is clearly wrong. *Id.*

The trial court did make an unequal division of the Logan County property. However, the trial court stated its reason for such a division — that the land was owned by Sabrina prior to the marriage. Therefore, we cannot say that the division of the Logan County property was clearly erroneous.

The trial court did not state any reason for the unequal division of the \$19,000 equity in the marital residence. While there is no requirement that each party receive a share of each item of marital property, section 9-12-315 requires an explanation for such unequal division. *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003) (*Cole I*). Because the trial court offered no explanation, either from the bench or in its written order, for the failure to divide the equity in the marital residence, we remand the matter to the trial court.

Danny also argues that the trial court made an unequal division of the parties' personal property and relies on a statement by the trial court that the court "awarded all the property that does not have much value to [Danny] for various reasons and the more expensive property, [the court orders] sold and the net proceeds divided." The trial court's statement was not necessarily an indication that Sabrina was being awarded a greater share of the personal property but, rather, an indication that it was Danny who was being awarded more of the personal property. This is borne out by the trial court awarding Danny certain items that Sabrina asked be sold while ordering other more expensive items on that part of the list

to be sold and the proceeds divided. The trial court indicated as much in its next statement that “[Danny] will get more use out of [these items] than [Sabrina] would.” The trial court also indicated that this unequal division in Danny’s favor was offset by the unequal division of the Logan County property.

We now turn to the forty-eight items of personal property that Danny asserts the trial court failed to dispose of. Sabrina argues that the trial court awarded these items to Danny. There was no specific testimony as to these items, and Danny did not assign any values to these items. We agree that the items were, in fact, awarded to Danny. In his motion, he specified that some of the tools were Craftsman brand tools. In her proposed division, Sabrina listed several items of Craftsman tools, as well as “various other tools,” and requested that they be awarded to Danny. In its ruling from the bench, the trial court adopted Sabrina’s proposed division of these items. Without values attached to the items or knowing whether they are the same ones that Danny claims were not disposed of by the trial court, we cannot say that the trial court was clearly erroneous in not dividing these items. It is Danny’s burden as appellant to bring up a record sufficient to show error. *Jones v. Jones*, 43 Ark. App. 7, 858 S.W.2d 130 (1993).

Attorney’s Fees

In Danny’s fourth point, he asserts that the trial court erred in awarding Sabrina \$6,000 towards her attorney’s fees. In response, Sabrina argues that the issue is moot because Danny voluntarily paid the fees in the form of allowing Sabrina to take a greater share of the retirement and bank accounts to include both the fee award and the judgment for half of the

funds Danny withdrew at the time of separation. If an appellant voluntarily pays a judgment, then the appeal from that judgment is moot, and we will not decide it. *See Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005); *Sherman Waterproofing, Inc. v. Darragh Co.*, 81 Ark. App. 74, 98 S.W.3d 446 (2003). In *Sherman Waterproofing*, we raised the issue of mootness on our own motion and concluded that, in the absence of an explanation for the payment of a judgment, we would consider it as having been voluntarily paid, thus rendering the issue involving the judgment moot. Here, Danny did not offer an explanation, and the payment appears to be part of a negotiated settlement concerning the division of bank and retirement accounts. We find the payment to be voluntary and do not consider this point because it is moot.

Affirmed in part; remanded in part.

MARSHALL and BAKER, JJ., agree.